FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 620

GROVER EARL LUCAS
Petitioner

v.

COMMONWEALTH OF VIRGINIA
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

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To: THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Grover Earl Lucas, of Roanoke, Virginia, respectfully prays that a writ of certiorari be issued out and under the seal of this Honorable Court to review the final decision and judgment of the Supreme Court of Appeals of Virginia, rendered on October 4, 1960, and hereinafter sets forth and represents as follows:

PROCEEDINGS IN COURTS BELOW

Grover Earl Lucas was separately indicted for the murders of his wife, Connie Maxey Lucas, his son, Dennis Freddie Lucas, and his daughter, Mildred Joyce Lucas, at the June, 1958 term of the Hustings Court of the City of Roanoke, Virginia. At the same time he was also indicted for felonious assault upon his daughter, Dorothy Mae Smith. These crimes were alleged in the indictment to have been committed on the ———— day of April, 1958. The undersigned counsel for the defendant, G. W. Reed, Jr., was appointed by the Trial Court to defend him, and on June 2, 1958 the Court appointed the medical examiner for the City of Roanoke to examine the mental condition of the defendant. As a result of the examination, on June 9, 1958, the defendant was ordered by the Court to be committed to the Criminal Department of Southwestern State Hospital at Marion, Virginia, and on August 11, 1958, Dr. Joseph R. Blalock and Dr. Charles A. Zeller, the Superintendent and Clinical Director, respectively, of said hospital, reported to the Court as follows:

> "The above-named was admitted to our Criminal Insane Department on June 12, 1958, having been committed by your Court for observation and report.
>
> "Since admission he has been carefully studied and history obtained so far as practical. As a result of our studies and observation we beg to report that he is not now psychotic or insane and has not been psychotic or insane since admission. The official diagnosis is 'Sociopathic Personality Disturbance, Alcoholism (addiction).' He is intellectually subnormal but not to such a degree as to affect his competency.
>
> "The electroencephalogram tracings (brain wave tracings) show some abnormal

changes suggestive of epilepsy, but during our period of observation no clinical evidence of epilepsy was observed. It might be stated that about 15 per cent of nonepileptics show abnormal brain waves and that about 15 percent of epileptics show normal brain waves.

"It is felt that this man is mentally competent and able to stand trial and testify in his own defense.

"Attention should be called to the fact that this man was found to have active pulmonary tuberculosis and while here he has been treated with INH 100 milligrams three times a day and PAS tablets 4 three times a day. With the permission of the Court we placed him in the Tuberculosis Building where this treatment could be instituted and where isolation precautions with reference to active tuberculosis could be followed. We recommend that this be called to the attention of the physician who will have his supervision in jail."

The first trial of this case on the indictment for the murder of Connie Maxey Lucas was had in September, 1958, and a new trial was granted by the Supreme Court of Appeals of Virginia for the failure of the Trial Court to instruct the jury on the issue of insanity.

The second trial began on April 25, 1960, and continued until April 27, 1960, resulting in a jury verdict of death by electrocution which was returned on the latter date. On April 28, 1960, the day following, the Trial Court entered judgment on the verdict and sentenced the defendant to die in the electric chair on July 6, 1960, which sentence was indefinitely stayed pending appeal by order entered on June 27, 1960. The defendant then sought to obtain a writ of error from the Supreme Court of Appeals of Virginia; however, the writ was denied by an order dated October 4, 1960 and entered on said date. See Appendix I.

The Governor of Virginia has granted a stay of execution until February 10, 1961 to enable Lucas to apply to this Honorable Court for a writ of certiorari.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257 (3) (June 25, 1948, c. 646, 62 Stat. 929).

QUESTIONS PRESENTED

Grover Earl Lucas assails the judgment of conviction and he here and now contends that he was denied due process of law and equal protection of the laws afforded him within the meaning, intent and spirit of the Fourteenth Amendment to the Constitution of the United States by the action of the Trial Court in:

(a) Permitting a medical expert to answer a hypothetical question propounded by the Attorney for the Commonwealth relating to the insanity of the defendant which did not embody the most material fact which the evidence tended to prove affecting the question upon which the witness was asked to express an opinion.

(b) Refusing to grant Instructions No. I and J which were timely offered by the defendant and which set forth the theories of his defense.

THE CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent part of the Fourteenth Amendment to the Constitution of the United States, reads as follows:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No

state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF FACTS

Grover Earl Lucas, an unemployed auto mechanic, 48 years of age, was the husband of Connie Maxey Lucas. The Lucases were married in 1952 or 1953 (R. p. 279) and had two children; namely, Mildred Joyce Lucas, and Dennis Freddie Lucas. A child of Connie Maxey Lucas, of a previous marriage named Dorothy Mae Smith also lived with the Lucas family. At the time of the alleged crimes the children were aged 8, 11, and 16, respectively, and they lived with the Lucases in a second story flat in the City of Roanoke, Virginia. Connie Maxey Lucas was employed by a laundry concern in the City of Roanoke and contributed mainly to the support of the family.

As a result of the absence of Connie Lucas from her employment, an investigation was made and the following situation was discovered at the Lucas apartment on Monday, April 28, 1958, at approximately 6:15 P. M.

Police Officer Ford, having been called to the Lucas home by a relative of Mrs. Lucas, found the door locked and entered the apartment through a bathroom window. In a bedroom he found the dead bodies of Dennis and Mildred Lucas, and also Dorothy Mae Smith, who was still alive. In another bedroom he discovered Connie Lucas who was in bed and also dead.

Dr. Irvin, the medical examiner, examined the body of Mrs. Lucas at the scene, and later at a funeral home. He determined that the cause of her death was due to a head injury caused by an edged instrument, and he esti

mated the time of death at 6:00 A. M. on April 27, 1958. (R. pp. 87, 88 and 89).

Shortly after the police entered the Lucas apartment, which was approximately 36 hours after the estimated time of death, the defendant was apprehended within a block or two from his home and taken into custody by the Roanoke police. (R. p. 85). After the defendant was brought to police headquarters he was then placed in an interrogation room where he gave a statement to the police. The statement was reduced to writing by Police Sgt. Belcher, and was subsequently signed by the defendant two days later in the Roanoke City jail. (R. pp. 60, 61, 93 and 97). The defendant was not requested to sign the statement at the time that it was originally related for the reason that he was at that time in a drunken condition. (R. p. 64). The written statement was introduced as Commonwealth's Exhibit No. 7 and is as follows:

"April 28, 1958
8:30 P. M.

"Statement of Grover Earl Lucas, white male, 49; 1126 Center Avenue, N. W.

"He states he and his wife had an argument Saturday night around 6:30 P. M., 4-26-58, and she said she was going to have me locked up, and I told her if she did I would be locked up for something, and went to bed after the argument with my wife.

"Around 5:30 A. M. Sunday morning I got up out of bed and went to the bathroom. Then I went downstairs and got a pick from under the back porch, I carried it back upstairs and laid it beside the bed and went back to bed. My wife woke up and talked to me some and she went back to sleep. I got up out of the bed and took the pick and hit her three times, while she was asleep, in the head. Then I walked to the

other room to the bed where Mildred, my daughter who is eleven years old, Dennis Lucas, my son who is nine years old, and Dorothy Smith, my wife's daughter, who is fifteen years old, all lying in the bed together. All three were asleep. I hit Dorothy three times in the head with the side of the pick. My son, Dennis, raised up in the bed and I hit him in the head one time with the side of the pick. Then Mildred raised up and I hit her two times in the side of the head with the pick. The reason I hit Dorothy and Mildred they had talked hateful to me. I hit my son because I knew I would not have a home any more. Then I carried the pick to the bathroom and set it behind some curtains; left the house and walked to 24th Street to the Steak House and drank a beer. After I finished the beer I went to Ora Johnson's home on Baker Avenue; stayed all night with a boy named Gilbert, whose last name I do not know.

"Around 2:00 P. M. or 2:30 P. M. today I went back to my home and saw that my wife was still lying in the bed dead; my son had crawled out of the bed in the other room and was lying on his face dead in the floor. Dorothy had also crawled out of the bed and was lying on the floor but was still breathing. Mildred was still lying in the bed dead.

"I left the house again and walked to Nellie Assaid's store on Tenth Street and Shenandoah Avenue and drank a beer; then walked back to the front of my home and sat down on the curb.

"I have read the above statement and it is true to the best of my knowledge, so that the truth may be known in this case without threat or promise I give this statement of my own free will.

(Signed) Grover Earl Lucas"

When the above statement was signed by the defendant on April 30, 1958, he was further questioned by

the police officers who testified that he elaborated in more detail his activities prior to and following the homicides. (R. pp. 98 to 102). During this interrogation it was learned that during the night (preceding the homicides) the defendant got up and drank some wine. (R. pp. 80 and 81).

There is no evidence in the record that the defendant was a person who was prone to violence or that he was experiencing any unusual domestic difficulties. On the contrary, witness Burrell Alls, who visited the Lucas home the night before the homicides, testified that " . . . they seemed to be getting along all right." (R. p. 164).

At the trial the defendant interposed as a defense that at the time of the commission of the homicides he was insane by reason of alcoholism or an epileptic condition referred to by all the medical witnesses as "psychomotor epilepsy", and as a result of either or both he was in an amnesic state and has no recollection of his activities for several days prior and subsequent to the homicides. Some of the pertinent facts in support of the defense will now be considered.

Lucas was an alcoholic and had been for years. He drank mostly wine and was frequently unemployed. The report from Southwestern State Hospital found him to be an alcoholic, and so did the defendant's witness, Dr. John O. Hurt. (R. p. 312). Many witnesses who knew Lucas testified as to his drinking habits and reference to some of the testimony follows: Ed Simpson said he drank all the time. (R. p. 116). Mrs. Gene Chelf, a storekeeper who sold beer and wine related that Lucas bought one or two quarts of wine at her store every day, and that he had been doing so for several years. (R. p. 133). Durwood Davis, another storekeeper, said Lucas bought one or two quarts of wine from him each day, but that he never saw him stagger. (R. pp. 144 and 145). Carl

Decker said he stayed intoxicated all the time. (R. p. 149). Harold Echols testified he had known Lucas to be a drinking man for ten to fifteen years. (R. p. 156). J. T. Wood said in the fifteen years that he had known the defendant he drank intoxicating beverages "all the time." (R. p. 180). Grover Lucas took the stand in his own behalf and testified that he started drinking when he was 14 years old, and, referring to recent years he said: "On, on an average—of course, I drank beer with it, I don't drink wine by itself and I drinked some whiskey. I drinked between three, four and maybe five quarts a day. If I just drinked wine I'd drink maybe six quarts a day." (R. p. 343).

We think that a fair appraisal of the evidence establishes that Grover Lucas had been an epileptic from early childhood and was subject to epileptic seizures that occurred from time to time, and that he had such a seizure while he was in jail several days after he was apprehended. The lay testimony will be considered first.

Mrs. Ada Meador, an older sister of the defendant, testified that she remembers the defendant having "spells" for over a period of ten or twelve years in his early childhood. She stated at page 265 of the Record as follows:

> "Q. What would happen?
>
> "A. Well, we would be just playing or sitting around or anything, and he would just fall over and go to quivvering (sic) and shaking; he'd turn right blue looking, froth at the mouth and bite his tongue.
>
> "Q. How often would he do that?
>
> "A. Well, sometimes it would be real often, and sometimes maybe it would be a week, maybe ten days between times, and he would have them again. He would usually have maybe three or four right along, and then it would be sometime later he would take again.

"Q. What would he do after he got over it?

"A. Well, he would just act like he was in a stupor; he didn't know anything." (R. p. 265).

This witness further testified that she last observed him having a spell in 1957. (R. pp. 265 and 266). Mrs. Meador further testified that her mother had epileptic fits up until she died; (R. p. 272), that her maternal cousin had fits, (R. p. 270), and that a maternal aunt has been committed to a mental institution in Virginia and West Virginia. (R. p. 271).

The defendant's maternal uncle, Claude Farley, aged 65, substantiated the testimony of Mrs. Meador and testified in part as follows:

"Q. When he was a boy did you ever observe him having any kind of illness or sickness?

"A. Well, he had what they called epileptic fits.

"Q. Did you ever see him have any fits?

"A. Yes, sir.

"Q. What did you see?

"A. Well, he'd just go to quivvering (sic), jerking and frothing at the mouth just like a mad dog.

"Q. Talk a little louder, please, sir.

"A. He'd go to quivvering and jerking, and his eyes would blare and he would shake like that, and he was frothing at the mouth just like a mad dog, and he would finally fall out.

"Q. Finally fall out?

"A. Yes, sir.

"Q. Fall down on the ground?

"A. Yes, sir; if somebody didn't get hold of him to keep him from falling.

"Q. How old was he when you observed this?

"A. Well, he was about a year or a year and a half.

"Q. How long did that go on?

"A. Well, it went on and when I quit working for his father he had them but not as often.

"Q. Not as often?

"A. No.

"Q. How old was he then?

"A. Round about 17 or 18.

"Q. You observed him having these things up until he was 17 or 18?

"A. Yes, sir. And after that I left there. I married and went away and moved away from there and got a better job.

"Q. How often would this occur?

"A. Sir?

"Q. How often would this happen?

"A. Sometimes maybe he'd go for a week or maybe two weeks before he'd have them, and then he'd have one two or three days on a straight." (R. pp. 287 and 288).

He further stated that a nephew had similar fits, (R. p. 288), his sister, the defendant's mother, had them, and that another sister "lost her mind and has been in institutions three different times". (R. p. 289).

Mrs. Betty Jean Bonds, a niece of the defendant, testified that in September, 1957 at Forest Hill, West Virginia, that she observed the following conduct of the defendant.

"A. Well, he was working for my husband, and he was cutting corn; and he had eat his dinner and went to the corn field to cut corn. And it was about one o'clock when he went to the corn field, and

about one-thirty or two o'clock he came back to the house and he was just shaking all over and just staggering to the house; and he couldn't speak, or he didn't if he could; and I talked to him for several minutes to try to find out what was wrong with him, and the only thing he said to me was 'Ice Water.' And I gave him ice water and got him to the bed and he stayed on the bed the rest of the evening; and he was still trembling about six o'clock that evening when I called him for supper, but he didn't eat anything." (R. pp. 293 and 294).

She further testified on page 294 of the Record, "When I was a child I saw him take spells like he would, you know, just start shaking, but my mother always run us children out of the room when he would take one of these spells, and wouldn't let us watch him."

Stanley Forest Bonds, the husband of Betty Jean Bonds, testified that he worked for Lucas 'around '52, '53" and "During this time I picked a power-saw up one evening and drove to his home. And he was doing some work on the power saw and he was sitting down on the porch; and he taken one of these jerking spells and kinda kicked out on the porch. And his wife, she come out and they covered him up there and said, 'He'll be all right; he's used to having those spells'." (R. p. 301).

Carl Decker who employed Lucas as an automobile mechanic for a period of approximately two and one-half years, which terminated about six months before the homicides, (R. p. 148), testified on direct examination:

"Q. Mr. Decker, there at the last we're speaking of, did you observe him at any time when it appeared to you that he wasn't in possession of any of his mental faculties?

"A. Well, the last he did was—maybe he'd be working on an automobile and back it up and put it back in the shop and swore he'd never seen the car.

"Q. Did he do that very often?

"A. Pretty often. That's the reason I got rid of him." (R. p. 149).

The defendant was also employed as an automobile mechanic by Calvin Decker. His testimony in this connection is as follows:

"Q. Calvin, while he was working for you, did you ever observe any conduct on his part that would indicate to you that he wasn't in possession of all of his faculties, his mental faculties?

"A. I know lots of things he done; he wouldn't go at his work right like a man should do, but whether it was to that I couldn't say.

"Q. Sir?

"A. Whether it was to mental or drinking I don't know whether it was either one of them.

"Q. Tell us specifically what you're referring to?

"A. Jobs that I would put him on he would forget and sometime maybe do the work wrong, or something like that." (R. p. 153).

Burrell Alls, cousin of the defendant, related the following:

"Q. Now, Mr. Alls, since you've known Grover Lucas have you ever known him at any time to do anything that was not considered normal?

"A. The only thing I know he fell out one time up there in the bathroom and had to carry him and put him to bed.

"Q. Were you there?

"A. I was there when they was taking and putting him to bed. I come in about that time.

"Q. You say he fell out in the bathroom. What do you mean "fell out" in the bathroom?

"A. He passed out is all I can tell you.

"Q. Did you ever see him any other time when he fell out?

"A. Well, one time me and him and his family, his wife and I believe the children was along, we was out on Back Creek and he took a spell out there and passed out, and we pulled off the side of the road and got him out there on the bank and he kinda come to and we got him back in the car and brought him home.

"Q. Was he drunk?

"A. No. I don't reckon. He'd been drinking that day, but he didn't seem to be drunk.

"Q. Sir?

"A. He didn't seem to be drunk.

"Q. How did he act when he came to?

"A. Well, his wife held him and he commenced coming to and he was limber when he passed out, and then when he come to he began to come to hisself, and we put him in the car and she held him until we got him to the house, and then took him on upstairs.

"Q. When was that?

"A. I don't remember; that was way long in the summer before this happened.

"Q. The summer of '57?

"A. That's right. I don't remember the date.

"Q. When was the other time?

"A. I don't remember that." (R. p. 162 and 163).

The Roanoke City jailers testified that several days after Lucas was placed in jail that he had some kind of spell. Jailer Thomas testified that he was called to Lucas' cell and that he was either lying on the bunk or the floor mumbling "something about some wine," which was given him and calmed him down. He also testified that

on this occasion he was placed on his bunk and constrained by a restraining sheet which he described as, "It's a piece of canvas with buckles on it that you buckle onto the bed and keeps the patient laying still so he won't hurt himself." (R. p. 251).

In connection with this incident, Jailer Ball related the following:

"A. Some four or five day, I just don't recall how many, a inmate in the jail with Grover Lucas called the jailer to come to the cell, and we found Grover Lucas in a stage of something of a faint or seizure of some type. I'm not in a position and I couldn't diagnose.

"Q. Where was he?

"A. He was on the floor in his cell.

"Q. What was he doing?

"A. He was in a nervous condition; he seemed to be trying to get up off the floor and seemed to be foaming at the mouth as a seizure of that type does, or would cause him to be that way.

"Q. He seemed to be foaming at the mouth?

"A. Yes.

"Q. What did you do?

"A. Well, we tried to comfort him as best we could and get him into his cell and get him on his bed.

"Q. Did you give him anything?

"A. He seemed to be talking and wanting some wine, and we gave him a little wine, I believe.

"Q. What effect did that have on him?

"A. Well, he began talking, commenting the wine; said he liked the blue wine, said he liked it very much.

"Q. Said he liked the blue wine very much?

"A. Yes, sir.

"Q. Mr. Ball, at any time while you were on duty was it necessary, or did you think it necessary, to restrain Grover Lucas in any way?

"A. You put me in a predicament like you did Mr. Thomas, now.

"Q. I just want you to tell the truth, just what you know?

"A. That question wasn't asked me in the other trial.

"Q. Well, I'll ask you to testify - -

"THE COURT: Are you asking him to testify now? It is not controlled by what was asked at the previous trial.

"A. Well, after Grover came to himself he began to be right restless and was beginning to work himself up in a sweat and bumpping (sic) himself around in the cell and around the the metal bunks, and we seen we had better take precautions and we restrained him for awhile until he did calm down.

"Q. What did you do?

"A. We used a restraining sheet on him.

"Q. Would you describe what that is? I've never seen one?

"A. A restraining sheet is a large canvass made for the purpose of people who are insane or emotional where they can't control themselves, and we strap them to the sheet and then run the straps under your bed and tie them down to where they can't move and injure themselves in any way.

"Q. How long was he under the restraining sheet?

"A. I don't believe he was under there much longer than two hours at the most until he calmed himself down." (R. p. 257, 258 and 259).

The record will show that Connie Maxey Lucas was buried on Thursday, May 1, 1958. On the morning of the funeral some of the defendant's relatives went to the Roanoke City detective bureau to inquire of him. They talked to Detective Captain Allman. Four of these relatives testified that they asked Captain Allman if Lucas needed a doctor, and that they were informed that "they" had a doctor taking care of him. (Virginia Whitaker R. p. 281; Mrs. Betty Jean Bonds, R. p. 295; Stanley Forest Bonds, R. p. 303; Mrs. Ada Meador, R. p. 269). Captain Allman vigorously denied making such an assertion; however, after quite a struggle, the defendant was able to substantiate their testimony by documentary proof. (Defendant's Exhibits No. 1 and 2). These exhibits, which are official jail records, show that a physician saw Lucas on "April 31, 1958" (obviously intending to mean the last day of April which was April 30) and on May 1st and 2nd. Dr. John Graham McCowan, the city jail physician, was on vacation at the time and did not treat Lucas. He testified that his alternate at the time was a Doctor Natt, now deceased, and that he, the witness, had no knowledge of the matter. (R. pp. 240, 241).

Dr. McCowan identified a drug named dilantin as being kept in the medicine cabinet in the jail. His testimony concerning this drug is as follows:

"Q. What is dilantin used for?

"A. It is used in the treatment of eleptics. (sic).

"Q. Is it used for any other treatment?

"A. Not that I know of.

"Q. As Jail Physician, do you know of your own knowledge whether Grover Lucas has been treated with dilantin in the City Jail?

"A. He probably was. I didn't put him on it. He probably was treated with it." (R. p. 244).

The significance of the foregoing facts to the defense in this case is brought to light by the medical testimony which will now be considered.

Dr. John O. Hurt, psychiatrist, testified on behalf of the defendant and part of his testimony follows:

"A. My diagnosis that I made at the time I examined Grover Lucas, and the diagnosis that I gave at the last hearing is the same diagnosis, and that was socio-pathic personality disturbance with the chronic alcoholism and a possible or suggestive finding of epilepsy.

"Q. Is that your diagnosis?

"A. Yes, sir. I think that is practically the same diagnosis as from Marion." (R. p. 312).

* * *

"Q. Doctor, would you tell us, in your opinion, what—I'm speaking of now at the time these homicides occurred, not today, or the last time you testified, but at the time this occurred—what was his mental condition with regard to alcoholism?

"A. Well, from the history that I obtained and from the quantity of alcohol he bought and was supposed to have consumed, it is my opinion he was drunk, deeply intoxicated.

"Q. Deeply intoxicated when; at what time?

"A. Well, I think he's been like that for six or seven years from the history that I obtained.

"Q. Did that apply on Sunday morning, April 27, 1958?

"A. I questioned him—you see I saw Mr. Lucas after he came back from Marion, you know, he hadn't had any alcohol for several months. I didn't get anything from him relevant from the 19th of April until about the 28th or 29th of April. He had a blank for that period of time when I questioned him. He said he couldn't recall, couldn't remember.

"Q. Did you endeavor to have him recall?

"A. I made every test I knew and every trick I knew and I didn't get any relevant answer at all that he could recall any events from about the 19th of April until about the 29th after he was in jail, or 28th. He denied remembering anything.

And I also, since I saw him this last time, went into the same subject with him in detail and he still denies remembering anything. And he hasn't worried a bit about it. He's gained about forty pounds of weight and doesn't seem to be concerned.

"Q. He's gained about forty pounds of weight?

"A. It looks like it to me. I didn't weigh him.

"Q. Is that material, in your opinion, regarding his memory? Where did he gain that weight; did you see him before he left here?

"A. The last time I saw him was at his previous trial. I don't know when he left here, but he has picked up considerably since I saw him last. In two years he's gained considerable weight and looks to be about forty pounds; thirty at least; he's awfully fat compared to what he was." (R. pp. 314 and 315).

* * *

"THE COURT: Read the question, please.

REPORTER:

"'Is there anything you know today that you did not know before when you testified that would strengthen your opinion on that?'"

"THE COURT: I don't know what he's talking about when he said 'that'. I don't know what the 'that' refers back to. Let him answer; but let's don't rehash what's already been covered.

"MR. REED: On 'that' I was referring to the self hypnosis as applies to this particular case.

"A. I testified on direct examination earlier that I didn't think he remembered because he's not

worrying about it; he's gaining weight down there on death row in the penitentiary." (R. p. 338).

* * *

"Q. With regard to the electroencephalogram tracings what brain wave tracings did you examine that were made available to you from Marion? How many of those tracings were there?

"A. I don't remember now; they made quite a few of them. It had eight leads; eight channel machine had eight leads and they made them at intervals.

"Q. What did they demonstrate to you with regard to epilepsy?

"A. Those tracings had some definite abnormal brain waves, some definite spikings in several places, series—not a series—at intervals but not constant intervals but they were there. They are called alpha spikings and indicated abnormal brain waves that are found in epileptics who have seizures." (R. p. 316).

* * *

"Q. What is this psychomotor epilepsy, is there any other name for that?

"A. Epileptic equivalent stage, automatism and fuge states. They are states where an epileptic has a violent mental reaction and doesn't have a convulsion, or may have it just before his convulsion or just after his convulsion, and may not have a convulsion at all." (R. pp. 316 and 317).

* * *

"Q. How long, in your experience, have you observed a person to have this psychomotor epilepsy; and tell the Court just how long a period of time and what their condition is in that state and what they remember about it after they come out? Explain that to the Court and Jury, please.

"A. I have seen patients in an equivalent state from several minutes to several days.

"Q. You recall the longest time you've ever observed a patient?

"A. I think we had one patient at Western State Hospital that stayed in about ten days.

"Q. He stayed in about ten days?

"A. He was illusional, combative, destructive, untidy and completely out of contact.

"Q. When a person comes out of that state what will bring them out of that state?

"A. They are treated; they're dehydrated in some instances, certain drugs will bring them out, and then have a convulsion will bring them out sometimes. (R. pp. 317 and 318).

* * *

"Q. The chronic alcoholism that you're speaking of, is that a disease of the brain or mind?

"A. It is well known that alcohol consumed in quantities over a long period of years certainly affects the brain.

"Q. Affects the brain, disease the brain?

"A. Yes, sir. It causes organic changes in the brain, which is certainly a disease of the brain.

"Q. Is it a fixed or settled insanity?

"A. It's an irreversible disease.

"Q. An irreversible disease?

"A. I think so. A chronic alcoholic can't get back to normal.

"Q. Is the disease of alcoholism you spoke of with reference to Grover Lucas an irreversible disease, in your opinion?

"A. If he consumed the alcohol that people claimed he did, and he claimed he did, he'd have to be a chronic alcoholic for the duration. I don't see how anything in the world could have prevented him from having mental deterioration drinking over that period of time." (R. pp. 321 and 322).

On cross examination Dr. Hurt testified as follows:

"A. A chronic alcoholic has an outstanding poor judgment; they have a very poor recall in memory; they have sluggish response; their reflexes are dull; they have an ironed out facial expression; they're indifferent to the situation; they don't apparently worry too much about anything, except getting them another drink, and I think Grover Lucas comes under that category as a first class candidate.

"Q. Can a person in that condition with a chronic brain syndrome, if he acts under the influence while he's drinking, can he later on recall and relate what he's done?

"A. If he was acutely intoxicated. when he performed something he probably didn't remember it. But they do have a very poor memory.

"Q. They have a very poor memory, and as I understand you to say, if he were acutely intoxicated at the time the chances are he would not remember?

"A. After he sobered up he probably wouldn't remember it, but if you give him another load of alcohol, or some other drug to knock out his higher centers he probably could recall and give a good detailed account. (R. p. 329).

* * *

"A. I said he had amnesia during that period of time that I could get no information of his activities during that time, but it's possible.

"Q. In your opinion he did not have that amnesia as a result of psychomotor epilepsy?

"A. I don't know.

"Q. He didn't have it from the result of the alcoholic brain syndrome during that period of time?

"A. I was of the opinion that his amnesia was due mostly to alcoholism, in my opinion, for that length of time." (R. p. 331).

Two psychiatrists testified on behalf of the Commonwealth and on cross examination of Dr. Neil McFadyen the following testimony was elicited. In referring to the electroencephalogram tracings and psychomotor epilepsy Dr. McFadyen testified as follows:

"A. It showed definite abnormalities suggestive of psychomotor epilepsy.

"Q. It showed the alpha spike, didn't it?

"A. Negative spike.

"Q. Did that spike indicate to you as to what type of epilepsy was involved?

"A. Psychomotor epilepsy.

"Q. Psychomotor epilepsy. And would you please tell the Court and Jury what psychomotor epilepsy is?

"A. Psychomotor epilepsy is one of the groups of epilepsy in which we find brain waves discharges of an abnormal character stemming from the frontal lobes. Psychomotor epilepsy does not necessarily have to have a physical or motor convulsion. The person may be confused, wander around and perform sometimes automatic acts.

"Q. It does or does not?

"A. It does.

"Q. It does perform automatic acts, that's true, isn't it?

"A. That's perfectly true." (R. pp. 375 and 376).

* * *

"Q. Doctor, what type of epilepsy has criminal consequences?

"A. Well, all forms of epilepsy can have possible criminal consequences.

"Q. Can or cannot, sir?

"A. All forms can." (R. p. 377).

"Q. I will ask you if you agree with this statement. Psychomotor epilepsy is characterized by automatic behavior during trance like states. You agree with that?

"A. I agree with that.

"Q. There is no remembrance of the epilepsy episode during which the epileptic may have become emotionally aroused, manifesting fear or rage, bad temper, ill humor, or irritability?

"A. That is correct.

"Q. You agree with that?

"A. Yes, sir.

"Q. Homicide occurs in those states?

"A. It has been known to occur in those states; yes, sir." (R. pp. 377 and 378).

Dr. Charles A. Zeller on cross examination testified as follows:

"Q. You didn't have any difficulty determining there was an abnormal brain wave on these three electroencephalogram tracings that were made of Grover Lucas, did you?

"A. No.

"Q. It clearly indicated to you that there was an abnormal wave?

"A. That's right; in the anterior frontal region.

"Q. And we call it an alpha spike.

"A. Spikes, yes.

"Q. What does that indicate to you; what type of epilepsy?

"A. As indicated in that region a psychomotor type.

"Q. You agree with what Dr. McFadyen said about that?

"A. I do. (R. p. 384).

The defendant in his testimony denied having any remembrance of the killings or what he did several days before or after. (R. pp. 346 to 348).

ARGUMENT

Point (a) In allowing the hypothetical question objected to, to be answered as propounded, the Trial Court—it can be reasonably assumed—indicated to the jury that the defense of insanity by reason of psychomotor epilepsy was without merit, and in so doing, in effect, deprived the defendant of due process of the law as it guarantees him the absolute right to maintain his defense to the crime charged.

> "Due process requires that a party sought to be affected by a proceeding shall have the right to raise such issues or set up any defense which he may have in the cause." 12 Am. Jur. Constitutional Law, Sec. 609, p. 305.
>
> "Even if he has no defense to the action, the fundamental law of the land secures to him the right to be heard in his defense." Ibid

The hypothetical question objected to appears on page 326 of the Record and hereafter as follows:

> "Q. Now, I ask you, Doctor, if a person who gets up and goes to another portion of the property, secures a pick and carries that pick into the bedroom occupied by he and his wife; that the wife arouses and he lays the pick down beside the bed; that he talks to her for a few minutes until he knows that she is again asleep; that he then gets up and takes the pick; he has gone to get and strikes her in the head causing her death; that he then goes into an adjoining room occupied by three children; strikes

one in the head because she has sauced him and would not mind; he strikes a little boy who is laying in the center of the bed, who is his son, and raised up about that time to look at him, because he knew that what he had done he wouldn't any longer have a home or any place for the boy to stay; that the other child then turns from the wall and faces him and he then strikes her in the head two or three times and kills her because she has no place to stay; he then takes the pick out and conceals it; dresses and leaves the premises. On the subsequent date, approximately 37 or 38 hours later he can tell exactly what had happened. Two days after the first he can again relate in detail and go into details with reference to what he has done and give a visual account and his reasoning therefor. A person that can do that could he possibly be suffering from motor epilepsy?"

The question is unobjectionable as far as it goes, however, before the answer was given, the defendant specifically objected to the omission of the facts of the case as they pertain to the alcohol known to have been consumed by the defendant. (R. p. 327). Its importance to the answer is reflected by the following testimony of Dr. Hurt before he answered the question:

"Q. Doctor, under those conditions could a person be suffering from psychomotor epilepsy?

"A. That is leaving out the possibility of drinking and everything else.

"Q. Just the question I asked you?

"A. Well, no." (R. p. 327).

Obviously what Dr. Hurt was referring to is contained in his testimony on pages 320 and 321 of the Record as follows:

"Q. Dr. Hurt, what effect, if any, does alcohol have on epilepsy?

"A. Alcohol is an irritant and I think it will aggravate epilepsy, make it worse. It's one of the

points in treating epilepsy to keep the body dry, to keep the brain, more or less dry. Alcohol causes edema and swelling of the brain; that's the cause of alcoholic psychosis and alcoholic DTs or delerium tremens and alcoholic convulsions, and that will also produce epileptic convulsions if a person is an epileptic. It's bad for an epileptic.

"Q. Alcohol is bad for an epileptic?

"A. In large quantities over a long period of time.

"Q. Dr. Hurt, I may have asked this question before. What does a person remember after he comes out of these psychomotor or automatism states that you told us about?

"A. All I've ever seen have complete amnesia; don't remember.

"Q. Are they responsible for the acts they do while they're in this state?

"A. They don't know what they're doing; they're absolutely out of contact; their higher brain centers are cut off, and they're acting like an animal; they're not responsible."

In a textbook by three authors published by The Michie Company and entitled, "The Law of Evidence in Virginia and West Virginia," at page 234, the application of the law in each state is explained and it is said:

"In Virginia, however, the question must embody all the material facts which the evidence tends to prove affecting the question upon which the expert is asked to express an opinion. Immaterial facts, or facts not affecting the particular question, need not be included. If there are any facts or testimony omitted which the exceptant thinks are material, he must clearly indicate such defects to the court, whereupon the court will require the propounder to supply such omissions as are material."

In the case of *Wessells v. Commonwealth*, 164 Va. 664, 180 S. E. 419, at page 422 S. E., the court said. " . . . the usual method of obtaining testimony from an expert, in a case involving a question of insanity, is for counsel to propound a hypothetical question embodying all the material facts which the evidence tends to prove affecting the question upon which the witness is asked to express an opinion."

The law of Virginia is again stated in *Lester v. Simpkins*, 117 Va. 55, 83 S. E. 1062, 1066, as follows:

> "It is a well-settled rule that a hypothetical question to an expert witness must embody all the material facts which the evidence tends to prove, affecting the question upon which the expert is asked to express an opinion."

It is respectfully submitted that the large quantities of alcoholic beverages consumed by the defendant over a long period of time is a material fact of the defense and should have been included in the question in order that a correct answer be given the jury. The question was properly objected to and the fact that it was overruled in the presence of the jury could only indicate to them that by approval of the question by the Trial Court there was no merit to the defense of insanity by reason of psychomotor epilepsy. In other words, it is reasonable to assume that the jury was led to believe that the drinking of the defendant had no part in this phase of the defense, and that they disregarded it in their deliberations, to the prejudice of the defendant to the extent of a denial of due process of the law when this objection is seriously considered in conjunction with the remaining objections raised herein.

Point (b)

(i) The refusal to grant Instruction No. I deprived the defendant of the right to defend

himself upon his plea of not guilty as is afforded him by the basic principles of justice embodied within the meaning of the "due process" and "equal protection" clause of the Constitution upon which this defendant has placed his life.

> "The defendant in a criminal prosecution is entitled to an instruction defining the law applicable to his theory of the case covering his defense, if there is any competent evidence reasonably tending to substantiate that theory, and if it is not unreasonable or stamped with improbability. He is entitled to have given charges correctly stating the law of his case, if they are supported by any evidence, however weak, insufficient, or doubtful in credibility it may be. It is immaterial that the testimony may spring from persons deeply interested, or may be contradicted so as to be entitled to but little weight in the estimation of the trial judge. Thus, in a criminal case, the defendant is entitled to instructions properly presenting the defense of insanity, . . . " 53 Am. Jur. Trial, Sec. 650, p. 501."
>
> * * *
>
> "In a criminal trial it is the duty of the court to instruct upon insanity where evidence tending to establish it is introduced and there is a proper request." 53 Am. Jur. Trial, Sec. 661, p. 508.

Several insanity instructions were given by the Trial Court. At the request of the Commonwealth Instructions 4, 5 and 6 were given; (R. p. 387) and E, F, G and H were given at the request of the defendant. (R. p. 387)

all of which instructions, we believe, properly state the law in general. However, the defendant requested Instructions I and J which pertain to the insanity issue as it applies specifically to his case.

The defendant offered and was refused Instruction No. I for the reason given by the court that " . . . this is singling out certain evidence and telling the Jury on behalf of the Court, if they believe he had a certain condition they must acquit him, but it's up to the Jury to determine if he had such a condition." (R. p. 388).

Instruction I as offered, and which we submit correctly states the law of the case, is as follows:

> "The Court instructs the jury that if you believe that Grover Lucas is afflicted with epilepsy and that prior to the commission of the acts charged in the indictments that he experienced what has been described by the medical evidence in this case as a state of "psychomotor epilepsy" and that such state continued and existed at the time of the commission of said acts, then you must acquit Grover Lucas on the grounds of insanity."

In *Honesty* v. *Commonwealth* 81 Va. 283 (1886) the Court at page 297 said:

> "The well-established rule of practice is, that if there is any evidence in the cause, though it be slight to which the instruction is applicable, and it propounds the law correctly, it should be given."

In the case of *Taylor* v. *Commonwealth* 186 Va. 587, 43 S. E. (2d) 906, it is stated at page 909 S. E.:

> "It is always the duty of the Court at the proper time to instruct the jury on all principles of law applicable to the pleadings and the evidence."

The Supreme Court of Appeals of Virginia has made it clear that both the Commonwealth and the defendant are entitled to proper instructions on their theory of the case:

> "Plainly the defendant was entitled to have his views of the case presented to the jury by a proper instruction tendered for that purpose." *Nelson* v. *Commonwealth*, 143 Va. 579, 130 S. E. 389, 392.
>
> " . . . but it is also true that the Commonwealth is entitled to instructions based upon its theory of the case supported by its evidence." *Oliver* v. *Commonwealth* 151 Va. 533, 145 S. E. 307, 309, 310.
>
> "It is elementary that both the Commonwealth and the defendant are entitled to appropriate instructions giving to the jury the law applicable to each version of the case predicated, of course, upon the evidence." *Campbell* v. *Commonwealth*, 162 Va. 818, 174 S. E. 856, 860.

And finally, in the case of *Thompson* v. *Commonwealth*, 193 Va. 704, 70 S. E. (2d) 284, the court said: " . . . defendant was entitled to have the question of *his* sanity determined by a jury." (288 S. E.) and "Defendant's evidence was sufficient to take the question of *his* sanity to the jury . . . " (S. E. 292) (Italics ours).

In view of the testimony of Commonwealth's witness, Dr. McFadyen, that the defendant's electroencephalogram tracings showed definite abnormalities suggestive of psychomotor epilepsy; and further that all types of epilepsy can have criminal consequences, and still further since the pertinent testimony of all of the medical witnesses is set forth *supra*, only a minimum of discussion seems to be required as to the applicability of the law to this question.

To begin with, the facts elicited regarding the psychomotor epilepsy go to the heart of the defense, and in fact constitute the theory of the defense as to that phase of the case. There was ample evidence to support the instruction. The instruction was not refused because it did not properly otherwise propound the law, but was refused because it "singled out certain evidence".

Instructions No. 5 and G are "right and wrong" instructions, and only apprised the jury of the law in general. In refusing Instruction No. I the jury could not have known whether, if they believed that the defendant experienced a state of psychomotor epilepsy, that such would have been an insanity excusing the defendant from his acts. This is particularly true when coupled with the reasons for the objection to the hypothetical question.

Point (b)

(ii) The proposition and authorities cited in Point (b) (i) are applicable here.

The defendant offered and was refused Instruction No. J for the reason given by the court that, " . . .for the court to tell the jury that any particular state of facts constitute insanity in law would be to invite the province of the jury." (R. p. 389).

Instruction No. J as offered is as follows:

> "The Court instructs the jury that if you believe to your satisfaction that Grover Lucas does not remember the commission of the homicides and that he is suffering from amnesia as a result of a diseased mind caused by long sustained indulgence in alcoholic beverages or as a result of psychomotor epilepsy, or both, then he is not responsible for his act of homicide and you must acquit him on the grounds of insanity."

This instruction states the defendant's theory of the case, not any specific facts upon which the theory is based. The instruction would have told the jury that amnesia resulting from a diseased mind produced by alcoholism, or psychomotor epilepsy, or both, is an insanity defense. Again, the facts elicited in respect to both constituted the entire defense, and this instruction would have told the jury that if they believed the defendant's theory of the case, then he was not responsible for his acts.

A trial by an impartial jury who must be informed of the law of the case is fundamental to the tradition of judicial proceedings. For what purpose then is a jury trial if the trier of fact is deprived of the knowledge of the law as it pertains to the defense for which it sits in judgment?

PRAYER

Accordingly, petitioner respectfully prays that an order staying the date of execution of the death penalty imposed upon the petitioner be granted by this Honorable Court; that a writ of certiorari be issued out and under the seal of this Honorable Court directed to the Supreme Court of Appeals of Virginia.

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Roanoke, Virginia

Attorneys for Petitioner

Dated: December 28, 1960

PROOF OF SERVICE

We, Alexander N. Apostolou and G. W. Reed, Jr., Attorneys for Grover Earl Lucas, petitioner herein, depose and say that on the 30th day of December, 1960, we served a copy of the foregoing petition, by mailing the same, with first class postage prepaid, to the following counsel of record:

Albertis S. Harrison, Jr.
Supreme Court Building
Richmond, Virginia

Attorney General of Virginia

Alexander N. Apostolou

G. W. Reed, Jr.

Subscribed and sworn to before me at Roanoke, Virginia, this 30th day of December, 1960.

Notary Public

My Commission expires:

November 23, 1963